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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

◆

JOHN GEORGE CIOCARLAN

Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN

Respondent

◆

Petition for Writ of Certiorari to the Supreme Court of Michigan

HAYDEN C. COVINGTON

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SUPREME COURT OF THE UNITED STATES

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JOHN GEORGE CIOCARLAN
Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN
Respondent

◆

Petition for Writ of Certiorari to the Supreme Court of Michigan

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, John George Ciocarlan, presents this his petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

The facts and problems here presented to this Court are similar to those involved in *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158. For reasons hereinafter discussed the petitioner requests this Court to reconsider its decision in the *Prince* case.

2. *Opinion of the Court Below.*

The opinion of the Supreme Court of Michigan is not yet reported. It appears in the record at pages 155-162.

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, 28 U. S. C. 344 (b).

4. *Timeliness of the Petition.*

The judgment of the Supreme Court of Michigan was entered on April 8, 1947. [162-163][1] The petition for writ of certiorari is filed within three months from the date of the entry of such judgment in said court.

5. *Ordinance Involved.*

This case is one in which the constitutionality of state legislation is drawn in question, to wit, Chapter 195, Section 4 of Compiled Ordinances, 1936, Ordinance 344-C of the City of Detroit, Michigan, reading as follows:

"AN ORDINANCE regulating persons engaged in so-called 'Street Trades,' prohibiting minors of certain ages from engaging in such trades and providing a penalty for the violation thereof.

"IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

"Section 1. Definition. For the purpose of this ordinance the words 'street trade' shall mean the business, occupation, undertaking or pursuit of:

(a) Peddling

(b) Boot blacking

(c) Delivering goods, wares, merchandise, telegrams, newspapers, magazines, periodicals, advertising matter, or any other printed or written material

[1] Numbers hereinafter appearing in brackets refer to pages in the printed record in this case.

(d) Distributing, selling or offering for sale, goods, wares, merchandise, newspapers, magazines, periodicals, advertising matter or any other printed or written material

(e) Soliciting subscriptions for newspapers, magazines or periodicals

(f) Offering services for hire or gain and/or

(g) Soliciting funds for the awarding of prizes by punchboards or otherwise

when conducted in any street, alley, park, square or other public place, or in the lobby or entrance of any building frequented by the public or conducted by house to house canvassing.

"Sec. 2. No male under twelve years of age and no female under eighteen years of age shall engage in any street trade, Provided, however, any male over the age of ten and under the age of twelve years actively engaged in delivering and/or selling magazines or periodicals on an established residential neighborhood route, at the date of the adoption hereof, may continue to do so subject to the provisions of this ordinance. It shall be unlawful to engage or permit the employment of any boys under the age of twelve years not now actively engaged in such delivery and/or selling, it being the intent of this provision to permit only such boys under twelve years, and over the age of ten years, now actively engaged in delivering and/or selling magazines or periodicals on an established residential neighborhood route to continue such delivery and/or selling.

"Sec. 3. No male under seventeen years of age shall engage in any street trade during school hours, unless legally excused from school, as now or hereafter provided by law. No male under the age of seventeen shall engage in any street trade between the hours of 8 o'clock p.m. and 5

o'clock a.m. Provided, that any male over the age of fourteen may sell and/or deliver periodicals, newspapers or magazines until 10 o'clock p.m. No male under the age of seventeen years shall engage in any street trade for a combined school and work period of more than eight hours in any one day.

"Sec. 4. It shall be unlawful for any person, firm, association, partnership, corporation or organization to hire or employ, or permit to be hired or employed, or suffer to work in any street trade any minor contrary to the terms of this ordinance. No person, firm, association, partnership, corporation or organization shall give, sell, deliver or consign any goods, wares, or merchandise, including newspapers, magazines, periodicals, advertising matter or any printed or written material to any minor for the purpose of selling, distributing or delivering the same in any street trade in violation of the terms of this ordinance. It shall be unlawful for any parent, guardian or custodian to suffer, permit, allow or induce any minor to engage in any street trade contrary to the provisions of this ordinance.

"Sec. 5. Penalty. Any person of the age of seventeen years or more who violates any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than One Hundred ($100) Dollars, or by imprisonment for not more than ninety (90) days, or by both such fine and imprisonment in the discretion of the court. Any child under the age of seventeen who violates any of the provisions of this ordinance shall be deemed a delinquent child and shall be dealt with as a juvenile delinquent.

Sec. 6. This ordinance is hereby declared to be immediately necessary for the preservation of the public peace,

health and safety and is hereby given immediate effect.

"Approved: December 17, 1935.

FRANK COUZENS, Mayor

"Attest: RICHARD W. READING, City Clerk.

"The above ordinance will take effect on the 18th day of December, 1935.

RICHARD W. READING, City Clerk"

6. *Constitutional Provisions Involved.*

The First and Fourteenth Amendments to the United States Constitution protecting the right of freedom of worship are relied upon.

7. *Questions Presented.*

(1) Does the conviction deprive petitioner of liberty and property without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, in that the judgment of conviction was entered without a finding that respondent

(a) clearly established by evidence the "existence of facts supporting the legislative judgment" so as to overcome the presumption of unconstitutionality which attaches to this ordinance by reason of its operating as a prima facie denial and infringement of the constitutional right of freedom of worship, and

(b) justified the operation of the ordinance by evidence clearly establishing that it was a reasonable means to the end sought to be accomplished and that it was not arbitrary, unreasonable or oppressive?

(2) Is the ordinance unconstitutional as construed and applied because it abridges and denies petitioner's right to

educate, teach and direct the spiritual welfare of his children, to maintain a family and to discharge his moral obligations as father while the children are denied the right to the benefits of such relationship, all contrary to the First and Fourteenth Amendments to the United States Constitution?

(3) Is the ordinance unconstitutional as construed and applied because it abridges and denies petitioner's and his children's freedom to worship Almighty God according to the commands of Jehovah and their freedom of conscience, contrary to the First and Fourteenth Amendments to the United States Constitution?

(4) Is the ordinance unconstitutional as construed and applied because it abridges and denies petitioner's and his children's privileges, rights and immunities secured by the Constitution in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

(5) Do the judgments of the courts below deprive petitioner of his liberty and property without due process of law, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution, in that there is an absence of evidence in the record to establish that he violated the ordinance in question?

8. *How Issues Raised.*

At the close of all the evidence, petitioner filed a motion to dismiss the complaint. [40-41] The second ground of the motion to dismiss was that the ordinance, when properly construed, did not apply to the activity of petitioner and his children because they were engaged in preaching the gospel and worshiping Almighty God according to the dictates of their consciences, which cannot properly be described as a "street trade" within the meaning of the ordi-

nance. [41] The fourth and fifth grounds of said motion urged that the ordinance, as construed and applied, abridged the rights of petitioner and his children of freedom to worship Almighty God, their freedom of conscience, and freedom of speech and of press, contrary to the First and Fourteenth Amendments to the United States Constitution and the Michigan Constitution. [41] All of these grounds were overruled by the judge of the Recorder's Court. [22, 39] The Recorder held that the ordinance applied and that it was not unconstitutional, and convicted petitioner. [22] The rulings of the Recorder in this case, convicting petitioner and overruling the motion to dismiss, were complained of in the affidavit for the writ of certiorari from the Circuit Court to the Recorder's Court. [16-17] The Circuit Court held that the conviction in this case was proper, that the ordinance was applicable and that there was no violation of the rights of petitioner and his children. [42-49]

Upon appeal to the Supreme Court of Michigan the federal questions were presented by application for leave to appeal to the Supreme Court. [15-17] In the briefs and upon the oral argument the federal questions were urged to the court. These federal questions were considered and decided adversely by the Supreme Court to petitioner. [155-162]

9. *Nature and History of Action.*

This proceeding against John George Ciocarlan was instituted in the Recorder's Court of Detroit by a complaint signed and filed by James Balaze, police officer of the City of Detroit. [21, 24]

In the complaint it was charged that petitioner violated Section 4 of Chapter 195 of the Compiled Ordinances of the City of Detroit of 1936, commonly known as the "Street Trades" ordinance, and otherwise entitled Ordinance No. 344-C. [25-27]

The complaint stated that Ciocarlan was the parent

of "Adeline Ciocarlan, a female of the age of 12 years, Ruth Ciocarlan, a female of the age of 8 years and Elizabeth Ciocarlan, a female of the age of 6 years," and "did permit said minors to engage in street trade, in that on the street at Michigan and Second Avenues, in the said City of Detroit, Michigan, they, the said minors, did each offer for sale a certain magazine, periodical or other printed material from the Watch Tower Bible and Tract Society." [24]

Petitioner was arrested on August 21, 1943, under such complaint. [32] The case came on for hearing in the Recorder's Court for the City of Detroit on November 30, 1943. [21, 28] At the close of the People's case, petitioner filed a motion to dismiss [22, 35, 40], which was denied. [22, 35] Petitioner and other witnesses testified in his defense. At the close of all the evidence, petitioner filed another motion to dismiss [22, 39, 40-41], which was denied. [22, 39] Petitioner was adjudged guilty, convicted and sentenced to pay a $35.00 fine or serve ten days in jail. [22, 39] He indicated his intention to apply to the Circuit Court for certiorari and was released on bail. [22] Thereafter he duly served his notice of intention to remove the case by certiorari to the Circuit Court. [12]

In the time and manner required by law, petitioner made his affidavit for writ of certiorari wherein he presented to the Circuit Court for Wayne County the same questions that are presented to this Court. [12-18] An order was granted directing the issuance of the writ of certiorari. [19] The writ of certiorari was duly issued and served upon the Recorder. [19, 20] In the time and manner required by law, the Recorder filed with the Circuit Court his return to the writ of certiorari. [21-41] In due course, the case came on for hearing before the Circuit Court. [42] An opinion was written in which the reasons were stated for affirming the finding of the Recorder's Court. [42-49] A judgment of affirmance was duly entered. [49] Petitioner

duly filed his motion for rehearing. [50-51] The motion was overruled. [52]

Thereafter petitioner, in the time and manner prescribed by law, filed and served his notice of claim of appeal to the Supreme Court of Michigan, accompanied by application for leave to appeal, which was granted by the Supreme Court of Michigan. The reasons and grounds for appeal were duly filed. [53-54] Upon appeal the judgment was affirmed for reasons stated in an opinion filed by the Supreme Court of Michigan. [155-162]

FACTS

John George Ciocarlan is an ordained minister, one of Jehovah's witnesses, engaged in preaching the gospel of God's kingdom since 1924. [35] In order to sustain himself and his family he works in a factory, from which he earns a living. [36] He does not earn his living from his preaching activity. [37] Any contribution he receives from his preaching activity is turned over to the Watch Tower Bible and Tract Society for the purpose of printing more like literature. [37] He is an authorized representative of the Society, a charitable religious organization created to preach the gospel of God's kingdom to the entire earth, which kingdom is the only hope of mankind to gain everlasting life. [36] One of the means he employs to preach the gospel is by the distribution on the public streets of Bible literature and the circulation of printed handbills advertising public Bible lectures. [36] His wife, Esther Ciocarlan, and all of his children are also Jehovah's witnesses. [36] The entire family regularly teach and preach the gospel of the Kingdom each week publicly upon the streets, and otherwise, by means of the distribution of literature explaining the Kingdom of Almighty God as revealed in the Bible. [35, 36, 37]

During August 1943, Jehovah's witnesses had a con-

vention assembly in Detroit, in the Cass Technical High School. [33, 36] As part of the convention activity, Jehovah's witnesses, by means of placards and handbills, advertised a public meeting, at which a talk was to be made on the subject, "Freedom in the New World." [33, 34, 36] Incident to and in connection with such advertisement, Jehovah's witnesses also distributed the magazines *Watchtower* and *Consolation* to pedestrians upon the public sidewalks of Detroit. [28-29, 31, 36, 38]

On the morning of August 21, 1943, petitioner and his family engaged in such public street advertisement of the meeting and convention and distributed the literature on the sidewalks near the corner of Michigan and Second Avenues in Detroit. He, his wife and children arrived in this vicinity before 10:30 in the morning. His wife and his daughters, Adeline, aged 12, Ruth aged 8, and Elizabeth, aged 6, took their positions alongside each other standing near the curb of Michigan Avenue, where they engaged in advertising said assembly by distributing the printed leaflet announcing the talk "Freedom in the New World" to be delivered at the convention, and distributed the magazines *Watchtower* and *Consolation*. [29, 31, 33, 34, 35, 37][2] The girls did not make any sales of any magazines. Moreover, they did not try to sell any magazines. [30, 31, 33, 34, 38] The officer said the girls were there just advertising. [31] However, he said he got a copy of the *Consolation* magazine from "the girl", presumably Elizabeth. [29] He also said that none of the pedestrians or other persons loitering on the street were bothering the children. [31]

[2] There is a sharp dispute in the testimony as to what Ruth was doing. Policeman Balaze said that Ruth wore a magazine bag over her shoulder, and exhibited magazines. [29] He said that Ruth and Adeline wore cardboards advertising something. [29] Ruth said that she wore no magazine bag and had no magazines with her. [34]

However, since this case was before the Circuit Court below on certiorari, construction of all the evidence most favorable to the People was necessary. Accordingly the facts above stated, based upon the officer's testimony, are assumed to be true.

While engaged in such work the mother and children stood about ten feet apart. [33, 34-35, 36] The mother was about one or two car lengths from the girls at the curb along the sidewalk; there was nothing between the mother and the children to obscure her view of them. [37-38] Petitioner told his wife to take care of the children. [36] He went across the street to the other corner where he could be in plain view of his wife and children. [36] On the other side of the street he was distributing *The Watchtower,* invitations to the free public Bible talk, and was wearing a cardboard sign advertising the convention. [36] While his wife and daughters on the other side of the street were engaging in this activity, the police arrived in a car. [28] Officer Balaze got out of the car and asked Elizabeth to get in the car. [28] She began to cry because she was afraid of the police. [28, 31, 38] A crowd gathered. [28] Petitioner's wife noticed the officer with Elizabeth when she began to cry. [37] She testified that the officer tried to forcibly put Elizabeth into the police car, at which the child started screaming. [38] She was only a few feet away and stepped over and identified herself to the officer. [28, 38] The officer denied that he abused the child in any way. [39] However, the testimony of petitioner's wife that the police-woman, accompanying Balaze, who also tried to put the little girl in the police car, tore her clothes, was not denied. [32, 38, 39] A few minutes after the mother began her conversation with the officer, petitioner came over from across the street. [29, 38] He informed Balaze that he was the father of the girls. [29, 32, 37, 38] He declared to the officer that they were Jehovah's witnesses and that, as a part of their duty to worship Almighty God, they were required to be on the streets and distribute the magazines. [29] He said that the little girl, Elizabeth, was perfectly safe because she was under the protection of God, and additionally was in the plain view of petitioner. [29, 36] He said that the girls were there with his consent. [29] He said that he

permitted them to be on the streets to do this work, but that he neither forced nor directed them to do so. [29, 37]

Petitioner was arrested by the officer, as was his wife, but the children were not arrested. [31; cf. 35] The parents were taken into custody and, since the children were in the custody of the parents, they accompanied them, although not arrested. [32]

The children were taught the importance of being Jehovah's witnesses from birth. [34] This public advertising of God's kingdom on the streets was their way of worship according to the dictates of their consciences. [34] No money was made out of the activity on the streets by the petitioner. [36] He did not profit in any way from the activity of the children. Much of the literature distributed was given away free to those who were willing to receive it but unable to make contributions. [36] Petitioner did not "sell" any magazines. [37] Contributions received from the placement of any literature was used to print more literature. [36, 37] Petitioner never, at any time, kept any of the money contributed. [37] Neither he nor his children were paid for their efforts put forth in such ministerial work. [37] Such work was done at the expense of petitioner. [37]

Reasons Relied on for Allowance of Writ

The decision of the court below and the majority opinion of this Court in *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158, are out of harmony with and conflict with the decisions of this Court in *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Meyer* v. *Nebraska,* 262 U. S. 390; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Follett* v. *McCormick,* 321 U. S. 573; and *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624. See the dissenting opinion of Jackson, Roberts and Frankfurter, Justices, in *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158, 177, 178, dissenting. The decision of this Court in *Prince* v. *Commonwealth of Massachusetts* should be reconsidered upon this petition for certiorari because of the cogent reasons stated by Mr. Justice Murphy in his dissent in *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158, 172-176.

The decision of the Supreme Court of Michigan is erroneous because based upon a decision of the Supreme Court of the United States which should be reconsidered and reversed and which the Court is hereby asked to reconsider, in the case of *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158, because it is erroneous. *Smith* v. *Allwright,* 321 U. S. 649, 655; *Burnet* v. *Coronado Oil and Gas Co.,* 285 U. S. 393, 404-411; Reed, *Stare Decisis and Constitutional Law,* 33 Pa. Bar Ass'n Q. (1938) 131, 133; Sachs, *Stare Decisis and the Legal Tender Cases* (1934) 20 Va. L. Rev. 856, 859; *New Hampshire* v. *Richardson,* 92 N. H. 178, 27 A. 2d 94.

The ordinance is unconstitutional as construed and applied because it abridges and denies petitioner's and the children's freedom to worship ALMIGHTY GOD according to the commands of Jehovah and their freedom of conscience, contrary to the First and Fourteenth Amendments to the United States Constitution. Insofar as the decision in the *Prince* case approved the constitutionality of the con-

struction placed upon a similar law it departs from and conflicts with the decisions cited above.

WHEREFORE petitioner prays that this Court issue a writ of certiorari to the Supreme Court of Michigan directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgment of the said Supreme Court of Michigan, affirming the judgment of conviction, be here set aside and petitioner dismissed from custody; and that petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

JOHN GEORGE CIOCARLAN
Petitioner

By HAYDEN C. COVINGTON
Attorney for Petitioner

BRIEF

in Support of Petition for Writ of Certiorari

SPECIFICATION OF ERRORS

The petitioner assigns the following errors in the record and proceedings of said cause:

1. The conviction deprives petitioner of liberty and property without due process of law contrary to the Fourteenth Amendment to the United States Constitution in that the judgment of conviction was entered without a finding that respondent clearly established by evidence the "existence of facts supporting the legislative judgment" so as to overcome the presumption of unconstitutionality which attaches to the ordinance by reason of its operating as a prima facie denial and infringement of the constitutional right of freedom of worship.

2. The conviction deprives petitioner of liberty and property without due process of law contrary to the Fourteenth Amendment to the United States Constitution in that the judgment of conviction was entered without a finding that respondent justified the operation of the ordinance by evidence clearly establishing that it was a reasonable means to the end sought to be accomplished and was not arbitrary, unreasonable or oppressive.

3. The ordinance is unconstitutional as construed and applied because it abridges and denies petitioner's right to educate, teach and direct the spiritual welfare of his children, to maintain a family and to discharge his moral obligation as father, while the children are denied the right to the benefits of such relationship, all contrary to the First and Fourteenth Amendments to the United States Constitution.

4. The ordinance is unconstitutional as construed and ap-

plied because it abridges and denies petitioner's and his children's freedom to worship Almighty God according to the commands of Jehovah and their freedom of conscience contrary to the First and Fourteenth Amendments to the United States Constitution.

5. The ordinance is unconstitutional as construed and applied because it abridges and denies petitioner's and his children's privileges, rights and immunities secured by the Constitution, in violation of the equal protection clause of the Fourteenth Amendment to the United State Constitution.

6. The conviction deprives petitioner of his liberty and property without due process of law, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution in that there is an absence of evidence in the record to establish that he violated the ordinance in question.

ARGUMENT

The decision of the Supreme Court of the United States in *Prince* v. *Massachusetts* (321 U. S. 158; rehearing denied 321 U. S. 804) should not be recognized as binding precedent for two reasons. First, because of its unrealistic disposal of the question presented upon presumed hypothetical dangers. The decision should be reconsidered because it is egregiously erroneous and has worked evil results.[3] Second, the decision has become very much impaired in the same manner as the decision of the Supreme Court of the United States in *Minersville School Dist.* v. *Gobitis* (310 U. S. 586) was impaired at the time the United States District Court for the Southern District of West Virginia was confronted

[3] This whole matter was carefully and painstakingly analyzed and discussed in the appellant's petition for rehearing, at pages 3-25, filed in No. 98, October Term 1943, Prince v. Commonwealth of Massachusetts, to which reference is here made.

with it in *Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251. That court refused to follow the *Gobitis* precedent.

The dissenting opinion of Mr. Justice Murphy in *Prince* v. *Commonwealth, supra*, expresses the correct rule of law that should be applied in this case in so far as the constitutional question is concerned. He said:

"Religious training and activity, whether performed by adult or child, are protected by the Fourteenth Amendment against interference by state action, except insofar as they violate reasonable regulations adopted for the protection of the public health, morals and welfare. Our problem here is whether a state, under the guise of enforcing its child labor laws, can lawfully prohibit girls under the age of eighteen and boys under the age of twelve from practicing their religious faith insofar as it involves the distribution or sale of religious tracts on the public streets. . . . The statutes in question prohibit all children within the specified age limits from selling or offering to sell 'any newspaper, magazines, periodicals or any other articles of merchandise of any description . . . in any street or public place.'

" . . . A square conflict between the constitutional guarantee of religious freedom and the state's legitimate interest in protecting the welfare of its children is thus presented.

"As the opinion of the Court demonstrates, the power of the state lawfully to control the religious and other activities of children is greater than its power over similar activities of adults. . . .

"In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, note 4. On the

contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded. The burden was therefore on the state of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case.

" . . . The reasonableness that justifies the prohibition of the ordinary distribution of literature in the public streets by children is not necessarily the reasonableness that justifies such a drastic restriction when the distribution is part of their religious faith. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111. If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639. . . .

"The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect. There is no proof that Betty Simmons' mode of worship constituted a serious menace to the public. . . . The sidewalk, no less than the cathedral or the evangelist's tent, is a proper place, under the Constitution, for the orderly worship of God. Such use of the streets is as necessary to . . . Jehovah's witnesses, the Salvation Army and others who practice religion without benefit of conventional shelters as is the use of the streets for purposes of passage.

" . . . To the extent that they flow from participation in ordinary commercial activities, these harms are irrelevant to this case. And the bare possibility that such harms might

emanate from distribution of religious literature is not, standing alone, sufficient justification for restricting freedom of conscience and religion. . . . Indeed, if probabilities are to be indulged in, the likelihood is that children engaged in serious religious endeavor are immune from such influences. Gambling, truancy, irregular eating and sleeping habits, and the more serious vices are not consistent with the high moral character ordinarily displayed by children fulfilling religious obligations. Moreover, Jehovah's witness' children invariably make their distributions in groups subject at all times to adult or parental control, as was done in this case. . . .

"No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And . . . Jehovah's witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little-used ordinances and statutes. See Mulder and Comisky, 'Jehovah's Witnesses Mold Constitutional Law', 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing

proof that a legitimate interest of the state is in grave danger."—321 U. S. at pp. 172, 173, 174, 175, 176.

In *Meyer* v. *Nebraska*, 262 U. S. 390, it was declared that the liberty secured by the federal compact was not merely freedom from bodily restraint; but that there was secured the right to engage in the common occupations of life, to marry, establish a home and bring up children. It was said that the citizen is protected in the enjoyment of those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen. *Berea College* v. *Kentucky*, 211 U. S. 45, 47; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589. Marriage and child-bearing is Almighty God's arrangement for all humankind that lives and shall live on earth. The state is powerless to interfere with or abridge the right of all persons within its boundary to procreate. Even this right cannot be denied to criminals. *Skinner* v. *Oklahoma*, 316 U. S. 535. By stronger force of reason the People here cannot interfere with and abridge the parents' right to bring up their children in a way acceptable to their own judgment so long as it is not inimical to the welfare of the children or the well-defined interest of the state.

"The police [power] of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."[4]

The police power is not supreme and is not unlimited. It is subject to the limitations imposed by the Federal Constitution upon every power of government. It will not be

[4] Cooley, *Constitutional Limitations*, 8th Ed., p. 1223. See also Massachusetts v. Alger, 7 Cush. 53, 84.

suffered to invade or impair the fundamental liberties of the citizen.[5]

The Court in the *Prince* case leaned heavily upon the doctrine of 'presumption of constitutionality of legislation' as a refuge from the constitutional assault against the illegal and unconstitutional misapplication of the ordinance in this case. The petitioner here does not dispute the verity of this well-established doctrine. However, it is asserted with emphasis, that when, as here, a statute enacted under the police power of the State either on its face or constructively abridges, prohibits, or infringes any of the freedoms guaranteed by the First Amendment to the Constitution, such ordinance is *presumptively invalid* and the burden falls on the authority asserting the police power to prove by a preponderance of the evidence that the statute is a valid exercise of the police power directed at some abuse of the constitutional rights which, unless prohibited or regulated, would constitute a *clear and present danger* to the health, safety or general security of the community as a whole. The showing of the *abuse* is a condition precedent to the exercise of the police power where such exercise of power has a tendency to limit, infringe, restrict or prohibit any of the constitutional freedoms. The police power does not even exist in such cases unless there is a clear showing of the *abuse*. This rule is well stated by Chief Justice Hughes in *De Jonge* v. *Oregon*, 299 U. S. 353 (1937):

"The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. . . . Therein lies the security of the republic, the very foundation of constitutional government."

This same rule was effectively applied by the United

[5] Jacobson *v.* Massachusetts, 197 U. S. 11; Cooley, *Constitutional Limitations*, 8th Ed., p. 1299.

States Court of Appeals for the District of Columbia in *Busey* v. *District of Columbia*, 78 U. S. App. D. C. 189, 138 F. 2d 592. There an occupational license tax was sought to be applied to the activity of Jehovah's witnesses. The controversy reached the Supreme Court after the precedent case of *Murdock* v. *Pennsylvania*, 319 U. S. 105, had been decided. The Court remanded the case to the Court of Appeals for further consideration. (139 U. S. 579) Upon reconsideration, Mr. Justice Edgerton, speaking for the court, held:

"Freedoms of speech, press, and religion are entitled to a preferred constitutional position because they are 'of the very essence of a scheme of ordered liberty.' (*Palko* v. *Connecticut*, 302 U. S. 319, 325) They are essential not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses. (Civil liberties are at present relatively little threatened by governmental action, but in many communities the civil liberties of unpopular groups are greatly threatened by private terrorism. Legal recognition of these liberties tends to discourage this terrorism.) . . .

"*We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed;* at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. *The burden of proof in such a case should be upon those who deny that these freedoms are invaded.* . . . No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms." [Emphasis added]

The decision of the Supreme Court of the United States

in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, followed this same rule:

"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg* v. *California*, 283 U. S. 359, 369-370; *Lovell* v. *Griffin*, 303 U. S. 444, 452."

In his book "The Struggle for Judicial Supremacy" (New York, Knopf, 1941), Robert H. Jackson, Associate Justice of the United States Supreme Court, says (p. 285):

"The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences with free speech, free press and free assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them."

In this same connection the words of Mr. Justice Roberts in *Schneider* v. *State*, 308 U. S. 147, are appropriate on the issues here presented, to wit:

"Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

In a vain attempt to justify their reliance upon the 'presumption of constitutionality', the courts below and the People argue that the judiciary does not have the authority to

question the legislative judgment in this matter but is bound by the determinations of the Detroit Council.

This very doctrine of supremacy of the legislature has been considered and condemned by one of the most eminent advocates and statesmen in the history of these United States, Daniel Webster, in *Dartmouth* v. *Woodward*, 4 Wheat. 518, 581-582, said:

"Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country." See *Webster's Works*.

The judicial branch of the government rather than the legislative authority must decide when freedom to worship Almighty God and freedom to maintain a family must yield to the police power, and in performing this task this Court must make a deeper inquiry than when property rights are involved.

"Mere legislative preferences for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be

abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." Murphy, J., *Thornhill* v. *Alabama,* 310 U. S. 88.

In *Schneider* v. *State,* 308 U. S. 147, it is said: "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Until the People here discharged their duty, by proving a clear and present danger of substantial evils to the children from the activity in which petitioner permitted them to engage, the convictions cannot be sustained. In holding that the clear and present danger test must be applied to police-power abridgments of the liberties protected by the First Amendment the United States Supreme Court, in *Bridges* v. *California,* 314 U. S. 252, 262-263, 273, said:

"Nevertheless, the 'clear and present danger' language of the Schenck case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, *Schenck* v. *United States,* supra; *Abrams* v. *United States,* 250 U. S. 616; under a criminal syndicalism act, *Whitney* v. *California,* supra; under an 'anti-insurrection' act, *Herndon* v. *Lowry,* supra; and for breach of the peace at common law, *Cantwell* v. *Connecticut,* supra. And very recently we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is destruction of life or property, or invasion of the right of privacy". *Thornhill* v. *Alabama,* 310 U. S. 88, 105.

"Moreover, the likelihood, however great, that a substan-

tive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis, J., concurring in *Whitney* v. *California,* supra, 274 U. S. at 374; it must be 'serious', id. 376. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State,* 308 U. S. 147, 161.

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press'. It must be taken as a command of the broadest scope that explicit language, read into the context of a liberty-loving society, will allow. . . .

"In accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here."

It is not contended that the children were engaged in any more hazardous activity while in the custody and control of petitioner than were the many children who were at the time on the public sidewalks of Detroit accompanying their parents while shopping, window-shopping, going to and from the theater, etc. The People do not urge that the children were unattended or abandoned by petitioner upon the public streets.

Pierce v. *Society of Sisters,* 268 U. S. 510, 534, controls here:

"Under the doctrine of *Meyer* v. *Nebraska,* 262 U. S. 390, we think it entirely plain that the Act of 1922 [the Oregon Compulsory Education Law] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. *The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations.*" [Emphasis added]

The cases concerning failure to furnish medical attention to an ill child, employment of child in hazardous industries or in jobs which are clearly shown to be dangerous and imperil the life, limb and health of the child do not apply to or control a situation of the kind involved here. Those cases deal with the *abuse,* or plainly reveal a clear and present danger of some injury which may be prevented by the state. It is unnecessary to discuss the many cases of this kind to be found in every state, because they are not in point.

The specious argument advocating the adoption of Spartan totalitarian principles by the premature and unjustified exercise of *parens patriae* over the child is rejected in *Meyer* v. *Nebraska,* 262 U. S. 390, at pages 401-402.

The Court owes a primary obligation to the provisions of the Federal Constitution. The sovereign people of the United States have established this fundamental law for the protection of themselves and their posterity. That docu-

ment's strong mandates securing the rights and freedoms of the sovereign people do not succumb to the specious and factitious rationalization of vague and indefinite contingencies to which the Court capitulated in *Prince* v. *Commonwealth*, 321 U. S. 158.

The Bill of Rights specifically rules out the application of the ordinance to the circumstances here. This Court will not cause to be blasted away from the people the protective wall which they have constructed around their cherished freedom and allow the police power to rush in to inundate their sovereignty. The moment the state or any municipality is allowed to trespass upon any one of these fundamental rights of the people without first proving a clear and present danger to some interest the state must protect under the police authority, freedom is forced into exile. In such circumstances 'cherished personal rights' are enjoyable only at the sufferance of the particular police authority holding the dictatorial whip-hand. The system of government envisioned by the freedom-loving people who caused these liberties to be set apart in an exalted position of safety would thus be destroyed.

Correction of constitutional decisions depends upon amendment of the Constitution rather than mere legislative relief. Here the Court is bound more freely to exercise its power to correct erroneous decisions because of the difficulty and delay in procuring an amendment. Reed, *Stare Decisis and Constitutional Law*, 33 PA. BAR ASS'N Q. (1938) 131, 133.[6]

When the Court interprets and applies provisions of the Constitution, it should be remembered that it is the Con-

[6] Smith *v.* Allwright, 321 U. S. 649, 655; Burnet *v.* Coronado Oil and Gas Co., 285 U. S. 393, 404-411, n. 5; Sachs, *Stare Decisis and the Legal Tender Cases* (1934) 20 VA L. REV. 856, 859, note 18.

stitution that is the real law, or rather the supreme law, of the land, and not the opinion of the Court.[7]

Were former decisions, which are added to the body of constitutional law, considered inextricable from that body and binding against the plain truth of the Constitution, it would become possible for the court, through a series of decisions, to pervert the meaning and abrogate the Constitution entirely. "The only protection which we can have against these results is to hold the court rigorously to the terms of the Constitution, to subject all its decisions to the unyielding test of reason, and, when any one of them fails to find a rational support in the Constitution, to recognize that it is not the law of the land.[8]

Mr. Justice Jackson said: "I consider it no part of my duty to worship the Supreme Court or its Justices. . . . So I have no hesitation in pointing out what seems to me its mistakes or shortcomings." (*The Struggle for Judicial Supremacy,* xvii-xviii.) Judge Dillon declared the fallibility of the courts, thus: "Mistakes, errors, fallacies and flaws elude us, in spite of ourselves, unless the case is pounded and hammered at the bar.[9] It is a wise precept that "infallibility is to be conceded to no tribunal. A legal principle to be well settled must be founded on sound reason." *Leavitt* v. *Morrow,* 6 Ohio St. 71, 78 (1856)[10]

It is contended that the Supreme Court of the United

[7] Compare the words of Charles Evans Hughes, to wit: "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution." *Addresses and Papers of Charles Evans Hughes* (2d ed., 1916) 185, 186.

[8] Abbott, *Justice and the Modern Law,* (1913) 76-78.

[9] Dillon, *The Laws and Jurisprudence of England and America* (1894) 190.

[10] "Judges at least are but men. . . . encompassed by error, seasoned with sin, and fettered by fallibility." State *v.* Metts, 125 Miss. 819, 836, 88 S. 525, 531 (1921) Ethridge, J., dissenting.

States committed a grave error when it ruled as it did in the *Prince* case, *supra*. In so far as this case is concerned this Court is requested to refuse to follow the *Prince* decision, reverse the same and reach the same conclusion argued for by Mr. Justice Murphy in his dissent in the *Prince* case.

In spite of the decision of the Supreme Court in the *Prince* case, the Court will be justified in refusing to follow that decision. The reason is that the decision, in addition to being erroneous, has been impaired. As Judge Parker pointed out in the case of *Barnette* v. *West Virginia State Board of Education* (47 F. Supp. 251, 1942) when the three-judge district court refused to follow the 1940 *Gobitis* decision of the Supreme Court of the United States, there had been a change in the personnel of the Supreme Court and three of its justices had announced that they then (1942) believed 'the *Gobitis* case was wrongly decided'. There, Judge Parker, speaking for the district court, said: "Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."

It should be observed, in the *Prince* case, *supra*, that of present members of the Court, Justices Murphy, Jackson and Frankfurter dissented. Although Justice Roberts was among the dissenters, he has since resigned from the Court. Chief Justice Stone is no longer on the Court by reason of death. Of the nine members of the Court only four are now on the Court that joined in the majority opinion in the *Prince* case. We do not know what the opinion of the new members, Mr. Justice Burton and Mr. Chief Justice Vinson, is. Therefore, for the reasons stated by Judge Parker

in the *Barnette* case, the *Prince* decision should not be considered as controlling authority. At least this should be grounds to reconsider the *Prince* decision.

In *State* ex rel. *Singleton* v. *Woodruff*, 153 Fla. 84, 13 S. 2d 704, it is said:

"Every system of law rests on a corresponding system of ethics that directs its course. . . . We are committed to a free exercise of religious opinion but . . . our system of law rests on Christian ethics.

"The reason the Bill of Rights immunized religion and the press from governmental interference is not far to see. Sections Five and Thirteen, Declaration of Rights, Constitution of Florida, merely reinforced the Federal immunization of these liberties. The authors of the Bill of Rights descended from ancestors who had been persecuted and condemned to rot in jail for indulging religious and secular beliefs. It took them a thousand years to wrest these liberties from arbitrary kings, hence the inhibition against any attempt to shackle the conscience. A liberated conscience is as essential to a robust democracy as blood is to the human body. Enslave the conscience and democracy will perish as certainly as the body will perish when the blood ceases to circulate. The church, the press and the assembly were set apart by the Bill of Rights to educate the mass conscience and give wings to public opinion. . . .

"Freedom of conscience is much older than the Declaration of rights or the common law. Peter and John first invoked it when they were commanded by the high priest and the Roman rulers to speak and teach no more in the name of God.—Acts 4: 17-21.[11]

[11 "But that it spread no further among the people, let us straitly threaten them, that they speak henceforth to no man in this name. And they called them, and commanded them not to speak at all nor teach in the name of Jesus. But Peter and John answered and said unto them. Whether it be right in the sight of God to hearken unto you more than unto God, judge ye. For we cannot but speak the things which we have seen and heard.

"So when they had further threatened them, they let them go, finding nothing how they might punish them, because of the people: for all men glorified God for that which was done."]

"So the soil from which it springs like many other cherished precepts of the common law reach back to Hebrew origin and historically reveal why a free press, speech, and religion are in a preferred class, protected by the State and Federal Constitutions and immunized from charge by the State. . . .

"Our whole theory of democratic policy as well as law rests on like moral standards and the church is a medium by which they are refined. Social regeneration is not measured by gadgets, sport suits, a chicken in every pot, and two cars in every garage; neither is it inherited like blue eyes and a stomach that will dissolve nails. It is tested by a spiritual response, self-discipline, a willingness to sacrifice, and a wholesome respect for the sanctity of the individual, his equality before the law, his abhorrence of privilege, and his right to a place in the sun without which democracy will go pagan and turn autocrat. Herein lies the obligation of the church and the press to point each generation the way to these virtues, and failing in this, they fail in their debt to the Bill of Rights."

"Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship . . . ? If so let them withstand all *beginnings* of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." *Associated Press* v. *N. L. R. B.*, 303 U. S. 103, 141, Mr. Justice Sutherland, dissenting.

The words of the law writer Vattel constitute a most timely warning for those whose obligation and high duty it is to guard the liberties of the people:[12]

[12] E. de Vattel, *The Law of Nations, or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (translated from edition of 1758 by Charles G. Fenwick in "The Classics of International Law", Washington, 1916).

"The constitution of a State and its laws are the foundations of public peace and the firm support of political authority, and the security for the liberty of the citizens. But this constitution is a mere dead letter, and the best laws are useless if they be not sacredly observed. It is therefore the duty of the nation to be ever on the watch that the laws be equally respected both by those who govern and by the people who are to be ruled by them. To attack the constitution of the State and to violate its laws is a capital crime against society; and if the persons who are guilty of it are those in authority, they add to their crime a perfidious abuse of the power confided to them. A Nation must uniformly put down such violations with all the vigor and vigilance which the importance of the case demands. . . .

"The constitution and laws of a State are rarely attacked from the front, it is against secret and gradual attacks that a Nation must chiefly guard. Sudden revolutions strike the imaginations of men; their history is written, and their secret sources are made known; but changes are overlooked when they come about insensibly by a series of steps which are scarcely noted. . . ."

The law here challenged is closely related to and a part of legislation which prohibits conduct contributing to the delinquency of children and truancy. Juvenile delinquency and child labor are old problems which mankind and governments have had to contend with for centuries. Progress and enlightenment during the last century have enabled the benevolent persons and organizations to accomplish much in the field of child welfare. Every enlightened nation, state and community has not hesitated to enact legislation to restrict abuses of children, and prohibit exploitation. Only the mean and derelict person has opposed or attempted to circumvent such legislation.

Those who have espoused such worthy movements are alarmed at the ineffectiveness of such measures to stem the rising tide of juvenile delinquencies and child labor dur-

ing World War II. This malady is directly attributable to breaking up of homes and family ties by total war. The increased participation by children in jobs and earning high wages has liberated many from family ties, that parental restraint, which has exposed many to drinking, gambling, undesirable places of entertainment and widespread immorality. These conditions are the evils which the delinquency and child labor laws are designed to curtail. They are here mentioned to emphasize the importance of protecting the family tie, which has been impaired by the courts below.

If in the field of secular education "state authority" is allowed to direct the activity and work of children in mechanics, manual training and other employments, then by parity of reason the parent not only must be left free to teach principles but must also be allowed to direct and train the child in the spiritual field by assisting it to *practice* God-given precepts. The rule contended for by the People is such that it would permit the proscribing of actions on the ground that they are improper acts of worship for the child. Such are 'radical principles of government that scarcely any religious body can accept'.

If this activity is secured to Jehovah's witnesses who are adults, there is no reason why equality of law and rules of reasonable construction do not also protect *children* who are Jehovah's witnesses, following their parents.

It is a totalitarian precept that children are the exclusive property of the state and that parents are only animal agencies to bring the children into existence for the benefit of the state. "The success of democratic institutions is measured, not by extent of territory, financial power, machines, or armaments, but by the desires, the hopes, and the deep-lying satisfactions of the individual men, women, and children who make up its citizenship.[13] "While the individual is becoming less significant as a unit in our elaborate

[13] Roosevelt, *Children in a Democracy* (1939), Government Printing Office.

system of production and distribution, his worth and integrity remain the cornerstone of our democratic philosophy. . . . In educating our children we desire, therefore, to give them freedom to express their natural interests, to enjoy life, and to gain that self-reliance which is hardly less important today than it was to the early American pioneer."[14]

The power of the State to require compulsory attendance at school and to direct the course of education of children in the public schools is not unlimited. This authority must yield to the prerogative of the parent to direct the education of the children in matters pertaining to the Bible and the faith or religion of such individuals. The right of the parent or guardian is held to be stronger and more vital in these sacred matters than the right of the state.[15]

The more vital state right to instill patriotism into the mind of the children has been held to be subordinate to the conscientious objections of the child to participation in flag-salute ceremonies and giving the pledge of allegiance. The Supreme Court of the United States declared invalid regulations providing for expulsion of children for refusal to participate in such ceremonies.[16]

If the educational policy of the State must yield to the consciences of the children and parents then with equal force of reason it must be said that here the ordinance cannot be sustained so as to justify the police power of the state in enforcing restrictive legislation designed to curb child labor. When attempted, the ordinance must yield, by the force of the Constitution, to the right of the parent to direct the child to engage in practices, service and worship

[14] *Children in a Democracy, supra*, p. 2, 3.

[15] People v. Stanley, 81 Colo. 276, 282, 265 P. 610; State v. Weedman, 55 S. Dak. 343, 226 N.W. 348; Spiller v. Woburn, 12 Allen (Mass.) 127; State v. Scheve, 91 N. W. 846; Weiss v. School District, 76 Wisc. 177; People v. Board of Education, 245 Ill. 334, 92 N. E. 251; Herold v. Parish Board, 136 La. 1034, 68 S. 16; Hardwicke v. Board of School Trustees, 54 Cal. A. 696, 205 P. 49.

[16] West Virginia State Board of Education v. Barnette, 319 U. S. 624.

voluntarily rendered by the child and considered necessary in the discharge of its covenant obligations to Jehovah God.

There are many cases which hold that the teaching of a child that the Bible forbids the salute to a flag (which resulted in the child's expulsion from school) does not warrant proceedings to have the child declared a dependent or delinquent child or justify prosecution of the parent for allegedly contributing to the dependency or delinquency of the child because of its being denied the right to attend school.[17]

The claimed and presumed injuries to the children from participation in the activity are too trivial and slight and do not justify the action taken by the city against the petitioner under the police power expressed in the ordinance misapplied here. The benefits that flow from exercise of the freedom to raise a family, direct the spiritual education of the children, freedom of worship by preaching in the manner the children did, outweigh the claimed interest of the state to such an extent as to exclude the encroachment by the city upon petitioner's inherent right. Hence the conviction cannot be sustained.

It is plain that the activity and worship here involved result from the working of the spirit and Word of Almighty God upon the children, and not from coercion by petitioner. To punish petitioner for these acts of the children is to inflict pains and penalties upon him for the acts and conduct of others which he has no right to control according to the law of Almighty God which he is bound to obey under

[17] *In re* Lefebvre, 91 N. H. 382, 20 A. 2d 185; *In re* Latrecchia, 128 N. J. L. 472, 26 A. 2d 881; People *v.* Sandstrom, 279 N. Y. 523, 18 N. E. 2d 840; People *v.* Chiafreddo, 381 Ill. 214, 44 N. E. 2d 888; Commonwealth *v.* Johnson, 308 Mass. 370; 35 N. E. 2d 801; State *v.* Smith, 155 Kans. 588, 127 P. 2d 518; Bolling *v.* Superior Court for Clallam County, Wash., 16 Wash. 2d 373, 133 P. 2d 803; *In re* Jones, 175 Misc. 451, 24 N. Y. S. 2d 10; *In re* Reed, 262 A. D. 814, 28 N. Y. S. 2d 92; South Dakota *v.* Davis, 10 N. W. 2d 288, decided July 3, 1943; Pendley *v.* State, 141 P. 2d 118, decided Sept. 1, 1943.

penalty of everlasting death at His hand.[18] The People of Michigan cannot protect or shield petitioner against the punishment of Almighty God for violation of His laws, and have no authority to issue an edict that warrants the state to compel petitioner to do acts which will result in his everlasting destruction or punish him for failing to obey his Maker's Supreme Law. This proposition is older than the State of Michigan. "The laws of nature are the laws of God; whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice."—Mr. Mason in Virginia in 1772 when he appeared as counsel for the Indians in *Robin* v. *Hardaway,* reported by Thomas Jefferson in 1 Jeff. (Va.) 109, at page 114.

Says Blackstone: "Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. . . . This principle therefore has more or less extent and effect . . . as man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to His Maker's will. . . . This law of nature, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, at all times. *No human laws are of any validity if contrary to this;* and such of them as are valid derive all their force and all their authority, mediately or immediately, from the original. . . . *That is to say no human laws should be suffered to contradict these.*" [Emphasis added] *Commentaries* (Chase 3d ed.), pp. 5-7.

[18] "Pharisees from among the multitude said unto him, Master, rebuke thy disciples. And he answered . . . I tell you that if these should hold their peace the stones would immediately cry out."—CHRIST JESUS, at Luke 19:39, 40; cf. Psalm 29:9, *American Standard Version;* Acts 3:22, 23; Ezekiel 33:6-8.

It cannot be said that the prosecutions were based on the fact that the children were physically or morally endangered by being on the street without reference to the nature of their work. [30] Even for children to be on the street unattended and alone during the daytime when school is not in session is not unlawful. The case arose during the summer vacation from school. Undoubtedly many boys and girls of the age of petitioner's children were on the streets at the same hour window-shopping, attending movies, running errands, or just idly standing on street corners. Busy with their Christian mission, and under the loving and watchful eye of their parents, these children were unquestionably more thoroughly protected than their less serious schoolmates. It is not unlawful for parents to take their children to town, allow the children to do their own shopping, attend amusements, or religious services. *A fortiori,* it is not unlawful for petitioner to take his children with him to downtown Detroit, and there, under his supervision, allow the children to worship Almighty God by distributing literature hallowing His name. When thus viewed, the contentions of the People and the assumption of the courts below that the ordinance was applicable to this activity become untenable.

If this conviction is sustained under this circumstance, then all God-fearing children in the city of Detroit are in peril of being taken from their parents and made wards of the state, as these parents themselves have been made liable to prosecution. Any parent that would approve his child's handing another child a Sunday-school periodical while

walking home together from Sunday school would be guilty of violating the law, and the child likewise would be guilty of the charge of becoming a public nuisance. Any Salvation Army lassie who countenanced the activity of her child in handing out copies of *War Cry,* even when accompanying its mother, would run the risk of prosecution under the present interpretation of the ordinance and having the child placed in "protective custody". Any child that happened to be so unfortunate as to "swap" his *Boys Life* magazine for his companion's top or kite on a public street in the view of a police officer would immmediately be arrested. The same principle might be applied to other ordinances regulating businesses and the police would be sent out to patrol the streets looking for citizens so unwary as to be caught making a casual, isolated transaction with another without having taken out a license for such "business". Mere statement of these absurdities serves clearly to demonstrate the impropriety of the prosecution here.

Certainly a construction which would require the police to drag off to jail upright Christian children and their parents unselfishly engaged in a work of greatest importance to mankind, is utterly unreasonable, especially when it is considered that they are dragged off as culprits while juvenile truants, idlers and pranksters look on. The harsh consequences of an ordinance requiring the filling of the jails with Christians instead of criminals would soon reflect itself upon the community, and instead of abating the increasing number of juvenile delinquencies, idleness and godlessness would be encouraged.

Conclusion

WHEREFORE the Supreme Court of the United States should grant the petition for writ of certiorari because the court below disposed of important and substantial federal questions in a way that is in conflict with the Constitution of the United States and applicable decisions of the nation's highest court, and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for exercise by the Supreme Court of the United States of its power of supervision and review to halt the same.

Respectfully submitted,

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